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**IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA  
CHARLESTON**



**City of Wheeling,  
Petitioner**

**DO NOT REMOVE  
FROM FILE**

**vs.)**

**No. 21-1001**

**The Public Service Commission of West Virginia  
And the City of Benwood,  
Respondents**

**STATEMENT OF THE RESPONDENT  
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA  
OF ITS REASONS FOR THE ENTRY OF ITS ORDERS OF  
NOVEMBER 12, 2021 AND DECEMBER 1, 2021 IN CASE NO. 21-0372-S-WI**

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OF WEST VIRGINIA  
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**January 28, 2022**

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**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA:**

The Respondent, Public Service Commission of West Virginia (hereafter “Commission”), hereby tenders for filing with this Honorable Court this statement of its reasons for the entry of its Orders of November 12, 2021 and December 1, 2021 in Case No. 21-0372-S-WI that is the subject of this appeal.

**I. STATEMENT OF THE CASE**

In this appeal, the City of Wheeling (hereafter “Wheeling”) incorrectly argues that the Commission should not have exercised its statutory right to utilize a 120-day review period to evaluate a formal rate complaint by a wholesale sewage treatment customer of the City of Wheeling.

On April 6, 2021, Wheeling passed an ordinance revising the rate charged to its wholesale sewage treatment customers by an increase of 45%, to become effective on May 21, 2021. On April 14, 2021, Wheeling filed a copy of its ordinance and revised tariff with the Commission.

On May 3, 2021, the City of Benwood Sanitary Board (hereafter “Benwood”), a political subdivision of the state and purchaser (or resale customer) of wholesale sewage treatment services from Wheeling, filed a formal complaint against Wheeling asserting that the rate increase was unfair, unreasonable, discriminatory and based on improperly allocated costs. Benwood asked the Commission to investigate its complaint pursuant to W. Va. Code §24-2-1(b)(6).

On May 27, 2021, Wheeling filed its Answer to the complaint.

On June 2, 2021, the Commission issued an Order that, among other things, required Wheeling to provide, within thirty days, sewage treatment and flow volumes and four items of financial information to support Wheeling's rate increase. The required financial information included a class cost of service study.<sup>1</sup> The Commission also ordered Commission Staff (hereafter "Staff") to submit a report in the case by Friday, July 23, 2021, and referred the matter to the Division of Administrative Law Judges (hereafter "ALJ"). The Commission referenced its statutory authority to toll the statutory decision period pending the filing by Wheeling of information supporting the rate increase that is necessary to decide the complaint, and tolled the 120-day statutory decision date for forty-five days until Friday, October 15, 2021.

On July 2, 2021, Wheeling filed a class cost of service study and other information required by the Commission's June 2, 2021 Order.

On July 15, 2021, Wheeling informed the Commission that Staff had brought errors in the class cost of service study filed on July 2, 2021 to Wheeling's attention and, as a result, Wheeling was filing "revised versions of the documents."

On July 19, 2021, Staff filed a motion requesting that the Commission toll this proceeding for thirteen days or until October 28, 2021, because Wheeling's first class cost of service study filed on July 2, 2021, failed to support Wheeling's rate ordinance and

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<sup>1</sup> A class cost of service study provides information on the costs of providing service, including detailed operation and maintenance expenses, taxes, debt service requirements and cash surplus needed for plant additions and working capital requirements, and an allocation of those cost of service components to the various customer classes served by the utility.

allocation to the resale class of customers in accordance with the requirements of W. Va. Code §24-2-1(b)(6). Staff also requested that the Commission likewise extend the Staff report due date of July 23, 2021 by thirteen days until August 5, 2021.

By Order issued July 22, 2021, the Commission granted Staff's motion and set October 28, 2021 (thirteen days after the previously established October 5, 2021 decision date) as the statutory decision date, extended the Staff report due date by thirteen days, and remanded the case to the ALJ.

The ALJ conducted a hearing on August 17, 2021.

On September 13, 2021, the ALJ issued a Recommended Decision adopting Wheeling's volumetric resale sewage treatment rate of \$3.68 per thousand gallons used as set forth in the Wheeling ordinance.

On September 24, 2021, Benwood filed Exceptions to the Recommended Decision. On September 28, 2021, Staff filed Exceptions to the Recommended Decision.

On October 26, 2021, the Commission issued an Order finding that Wheeling filed the necessary information showing the basis of the rates, fees, and charges and other information required by the Commission on July 15, 2021, and concluding that (1) W. Va. Code §24-2-1(b)(6) authorizes the Commission to toll the statutory period of 120 days in wholesale wastewater rate disputes between a political subdivision of the state and its customer until the necessary information showing the basis of the rates, fees, and charges or other information required by the Commission is filed, and (2) the Commission should toll the statutory period of 120-days in this case from July 15, 2021, the date that Wheeling filed the necessary information showing the basis of the rates, fees, and charges and other

information required by the Commission. Based on these findings of fact and conclusions of law, the Commission determined that the statutory review and decision period would end 120-days from July 15, 2021, resulting in a statutory decision due date of November 12, 2021.

No party filed an objection to the Commission calculation of the November 12, 2021 statutory decision due date prior to issuance of the final Order on November 12, 2021.

On November 12, 2021, the Commission issued its Final Order.

On November 22, 2021, Wheeling filed a Petition for Reconsideration of Final Commission Order and Motion to Stay. Wheeling did not ask the Commission to reconsider its substantive ruling in the case. Wheeling, instead, argued that the Commission improperly extended the statutory decision date.

On December 1, 2021, the Commission denied Wheeling's Petition for Reconsideration of Final Commission Order and Motion to Stay.

On December 10, 2021, Wheeling filed a Petition for Appeal of the Commission final order to this Honorable Court.

## **II. SUMMARY OF ARGUMENT**

The Commission complied with the statutory requirement to decide the complaint within 120 days of the date that the public utility provided the Commission with necessary information and support of its rate increase. W. Va. Code §24-2-1(b)(6) authorizes the Commission to toll the 120-day period for resolution of wholesale wastewater disputes between a political subdivision of the state and its customers "until the necessary information showing the basis of rates, fees, and charges or other information as the



commission considers necessary is filed.” Due to errors in an earlier filing, Wheeling did not file the correct necessary information showing the basis of the rates, fees, and charges and other information required by the Commission until July 15, 2021. If the Court believes the meaning of the word “toll” in the statute is ambiguous, the Commission construction of the statute is permissible and proper. The Commission properly resolved the complaint within 120 days of July 15, 2021, which was November 12, 2021.

### **III. STATEMENT REGARDING ORAL ARGUMENT**

By Order entered December 14, 2021, the Court stated that the Clerk of Court will, on a later date, provide counsel with a Notice of Argument under Rule 19(b) of the Rules of Appellate Procedure, setting forth the date and time of oral argument.

### **IV. STANDARD OF REVIEW**

This Court has held, “As a general rule, ‘Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review.’” Pool v. Greater Harrison Cty. Pub. Serv. Dist., 241 W. Va. 233, 237, 821 S.E.2d 14, 18 (2018); (citing Syllabus Point 1, Appalachian Power Co. v. State Tax Dept of W.Va., 195 W.Va. 573, 466 S.E.2d 424 (1995).

In Monongahela Power Co. v. Pub. Serv. Comm’n, 166 W.Va. 423, 276 S.E.2d 179, 180 (1981), this Court adopted the comprehensive standard of review of Commission decisions as applied by many states and set forth in Permian Basin Area Rate Cases, 390 U.S. 747 (1968):

In reviewing a Public Service Commission order, we will first determine whether the Commission’s order, viewed in light of the relevant facts and of the Commission’s broad regulatory duties, abused or exceeded its

authority. We will examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence.... The Court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.

Monongahela Power Co., Syllabus Point 2 (in relevant part).

This Court summarized its three-pronged analysis in Monongahela Power Co. in Syllabus Point 1 of Central West Virginia Refuse, Inc. v. Pub. Serv. Comm'n, 190 W.Va. 416, 438 S.E.2d 596 (1993) as follows:

The detailed standard for our review of an order of the Public Service Commission contained in Syllabus Point 2 of Monongahela Power Co. v. Public Service Commission, 166 W.Va. 423, 276 S.E.2d 179 (1981) may be summarized as follows: (1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commission's findings; and (3) whether the substantive result of the Commission's order is proper.

Central West Virginia Refuse, Inc. v. Pub. Serv. Comm'n, 190 W.Va. 416, 420; 438 S.E.2d 596, 600-601 (1993).

## **V. ARGUMENT**

**A. When Commission jurisdiction is invoked, the Legislature authorizes the Commission 120 days to review cost-based justification for a municipal rate ordinance and resolve a wholesale customer rate dispute.**

W. Va. Code §24-2-1(b)(6) requires that the Commission resolve rate disputes between a political subdivision of the state providing wholesale wastewater treatment and its customer within 120 days of filing of a complaint. If, however, the Commission does not have before it necessary cost-based justification for a municipal ordinance when a complaint is filed, the statute authorizes the Commission to toll the 120-day decision date.

The 120-day period for resolution of the dispute may be tolled by the commission until the necessary information showing the basis of the rates, fees, and charges or other information as the commission considers necessary is filed.

W. Va. Code §24-2-1(b)(6).

We agree with Wheeling's calculation on page 16 of its Petition that the last day for Commission jurisdiction based on the May 3, 2021 filing date of the Complaint would have been August 31, 2021, but only if the Commission had before it on May 3 "necessary information showing the basis of the rates, fees, and charges or other information as the commission considers necessary." That was not the case. The "may be tolled" proviso of W.Va. Code §24-2-1(b)(6) means that if the Commission does not have all the necessary information before it at the time a complaint is filed (because the utility did not file it with its rate ordinance or on the day the complaint was filed), then the Commission has authority to determine that the 120-day review period begins on the date the utility files the necessary information.

Wheeling filed its rate ordinance with the Commission on April 14, 2021, but the filing did not include a class cost of service study or other cost-based information to support the rate increase.

Wheeling filed its Answer to Benwood's formal complaint on May 27, 2021, but the Answer did not provide a class cost of service study or other cost-based information to support the rate ordinance.

After the Commission issued an Order on June 2, 2021, listing the information that Wheeling needed to file, Wheeling responded with information on July 2, 2021, but later

admitted that its class cost of service study contained errors (Wheeling filing July 15, 2021).

Finally, on July 15, 2021, Wheeling filed its revised class cost of service study.

The Commission did not have before it the “necessary information showing the basis of the rates, fees, and charges” until July 15, 2021 when Wheeling filed its revised study, which was 92 days after the complaint was filed by Benwood.

The Commission, in its October 26, 2021, Order, recognized that pursuant to W. Va. Code §24-2-1(b)(6), a prior tolling order issued on July 22, 2021, could have tolled the decision period to a date 120 days from July 15, 2021 or until November 12, 2021. Therefore, as explained in the December 1, 2021 Order on reconsideration, the Commission corrected the tolling by extending the decision period to November 12, 2021.

The Legislature had good reason to allow the Commission to extend the statutory decision review period in W. Va. Code §24-2-1(b)(6) complaints when necessary cost-based information to support the rate ordinance is missing. Unlike investor owned public utilities or smaller public service districts that file rate increase applications with the Commission, pursuant to W. Va. Code §24-2-4a(a), locally rate regulated<sup>2</sup> municipal utilities like Wheeling are exempt from the rate filing requirements of W. Va. Code §24-2-4a(b)-(g), and do not request rate increases from the Commission. They instead pass rate ordinances that are not subject to prior Commission review or approval. W. Va.

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<sup>2</sup> This brief uses the descriptor “locally rate regulated” to refer to a political subdivision of the state providing water or sewer services and having at least 4,500 customers and annual gross combined revenues of \$3 million dollars or more. Several statutes in Chapter 24 of the Code address the reduced level of regulation applicable to these public utilities. W. Va. Code §§ 24-2-1(b); 24-2-2; 24-2-3; 24-2-4a; 24-2-4b; 24-2-11.

Code §§8-11-4; 16-13-16; 24-1-1(j). Therefore, unless the utility voluntarily files cost-based information with its ordinance, the Commission does not have financial justification for the utility's rates when they go into effect. Wheeling did not file rate justification when it filed its municipal ordinance on April 14, 2021.

The rationale for municipal and larger public service district local rate regulation, in lieu of Commission rate regulation, is that customers of political subdivision utilities are also voters in a locality and may express their objections or support for utility ratemaking and governance through the ballot box. Wholesale customers like Benwood that purchase water or wastewater from a locally rate regulated municipal utility like Wheeling, are often smaller cities or public service districts located outside the large municipality's city limits. As such, in contrast to Wheeling's customers within city limits, Benwood has no ability through the ballot box to object or express support for municipal utility rates and governance. To avoid burdening circuit courts with utility rate disputes and to ensure due process for wholesale customers like Benwood, the Legislature delegated adjudication of wholesale customer complaints against locally rate regulated municipal water and wastewater utilities to the Commission. W. Va. Code §24-2-1(b)(6).

When Commission jurisdiction over a locally rate regulated water or wastewater utility rate is invoked by a wholesale customer formal complaint, W. Va. Code §24-2-1(b)(6) ensures due process for a customer like Benwood, by acknowledging that the Commission should have before it all necessary rate justification from Wheeling in order to adjudicate the complaint. This is just and reasonable because the Commission is unable to make a reasoned decision until it has necessary information. Further, the proviso at issue

in this case ensures that the Commission will have time (120 days) to evaluate the information and issue a final order resolving the rate dispute.

The 120-day period for resolution of the dispute may be tolled by the Commission until the necessary information showing the basis of the rates, fees, and charges or other information as the commission considers necessary is filed.

W. Va. Code §24-2-1(b)(6). In the instant case, only Wheeling, and not the Commission or Benwood, had control over whether and when the Commission had the necessary financial information before it.

Upon receipt of the necessary information, the Commission has a statutory duty to “[e]nsure that rates and charges for utility services are just, reasonable, applied without unjust discrimination or preference ... and based primarily on the costs of providing these services.” W. Va. Code §24-1-1(a)(4). Without the necessary information showing the basis of a rate charged to a wholesale customer, the Commission is unable to determine whether that rate is just, reasonable, applied without unjust discrimination or preference and is based primarily on the costs to provide service. The purpose of the proviso is to ensure the Commission, upon receipt of all necessary information, has 120 days to investigate the disputed rates and ensure that the disputed rates meet the requirements of W. Va. Code §24-1-1(a)(4).

**B. The complexity of the case had no bearing on the number of days that the Commission is permitted by law to review a wholesale customer complaint against a locally rate regulated municipal utility.**

The complexity of this wholesale customer complaint case had no impact on the fact that November 12, 2021 was 120 days from the date Wheeling filed the information

necessary for the Commission to evaluate the rate issues in this case. The Commission referenced the complexity of the case in its October 26, 2021 Order only to explain why the full 120 day review period as provided in W. Va. Code §24-2-1(b)(6) was necessary in lieu of a shorter period. The October 26, 2021 Order calculated the statutory decision date that the Commission could have established at any time after Wheeling filed the necessary information on July 15, 2021.

**C. The Public Service Commission did not act arbitrarily and capriciously when it tolled the decision due date until November 12, 2021.**

The Commission's decision to toll the resolution date was authorized by W. Va. Code §24-2-1(b)(6) and was not arbitrary or capricious.

The word "toll" in W. Va. Code §24-2-1(b)(6) means that the Commission may establish a review period that will end 120 days from the date the Commission has all necessary information before it to resolve a complaint. Wheeling argues, incorrectly, that the word "toll" should mean to place the review period on hold. Under Wheeling's "place on hold" interpretation, the 120-day decision clock would start on the day a complaint is filed regardless of whether the Commission has before it any information it needs to evaluate the case. The days following the filing date and before (i) a response from the locally rate regulated utility voluntarily providing necessary financial justification, or (ii) a Commission order requiring the utility to provide necessary information and tolling the statutory period, would simply be lost days that reduce the parties' and the Commission's time to evaluate the case when it finally does have necessary information before it.



Under Wheeling's "place on hold" interpretation, the time allowed to the parties and the Commission to review the supporting rate information, once it is filed, would be less than 120 days. Such an outcome would be unjust because the utility alone has control over when it provides the Commission with necessary information. Moreover, the Commission could be forced to render a premature decision without having time to evaluate the rate issues. If a utility is recalcitrant in providing support for its rate ordinance, a case could require repeated Commission orders to file necessary information and successive incomplete or inadequate responsive filings by the utility. Each order and response would tick away more days from the 120-day review period. Taken to the extreme, the Commission could be left with an absurdly brief period of time to evaluate the case. A utility that lacks any cost-based support for its rate increase would have an incentive to delay its responses to Commission requests for information in order to run down the clock.

The Legislature has not defined the word "toll" in W. Va. Code Chapter 24. If this Court concludes that the Legislature has not directly spoken to the precise definition of "toll" in W. Va. Code §24-2-1(b)(6), then the Commission's interpretation is the only permissible construction to ensure a reasoned decision in a complaint like the Benwood complaint. When determining whether a state agency's (Division of Motor Vehicles) statutory interpretation should be sustained, this Court has stated,

we apply the standards set out by the United States Supreme Court in *M. U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). We first ask whether the Legislature has "directly spoken to the precise [legal] question at issue." *Chevron*, 467 U.S. at 842, 104 S. Ct. at 2781, 81 L. Ed. 2d at 702-03. "If the intention of the Legislature is clear, that is the end of the matter." *Id.* If it is not, we may not simply impose our own construction of the statute. "Rather, if the statute



is silent or ambiguous with respect to the specific issue, the question for the court is whether the [DMV's] answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S. Ct. at 2782, 81 L. Ed. 2d at 703. See *Pauley v. Bethenergy Mines Inc.*, 501 U.S. 680, 696-98, 111 S. Ct. 2524, 2534, 115 L. Ed. 2d 604, 623-25 (1991). In the present case, it is clear that the Legislature has not spoken to the precise question at issue. Therefore, we review the DMV's decision to determine whether its construction is one the Legislature would have sanctioned. See *United States v. Shimer*, 367 U.S. 374, 383, 81 S. Ct. 1554, 1560-61, 6 L. Ed. 2d 908, 915 (1961).

Sniffin v. Cline, 193 W. Va. 370, 374, 456 S.E.2d 451, 455 (1995). See also, Syllabus Point 1 of Appalachian Power Co. v. State Tax Dep't., 195 W.Va. 573, 466 S.E.2d 424 (1995). In upholding the DMV interpretation of statute, this Court stated,

. . .absent clear legislative intent to the contrary, we afford deference to a reasonable and permissible construction of the statute by the DMV because it has policymaking authority with regard to the statute.

Here, the DMV's construction, as reflected in its brief submitted in this case, is reasonable, supported by the law, not contrary to legislative intent, and is consistent with this Court's prior decisions. We further find that the DMV's answer is a reasonable accommodation of potentially conflicting policies that were committed to the DMV by the statute. Because we find DMV's construction is one the Legislature would have sanctioned, we defer to that interpretation and, accordingly reverse the circuit court.

Sniffin, 193 W. Va. at 374, 456 S.E.2d at 455. This Court has also stated,

An inquiring court--even a court empowered to conduct *de novo* review--must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion.

Appalachian Power, 195 W. Va. at 582, 466 S.E.2d at 433.

The "may be tolled" proviso of W. Va. Code §24-2-1(b)(6) means that if the Commission does not have all the necessary information before it at the time a complaint is filed (because the utility did not file it with its rate ordinance or on the date the complaint

was filed), then the Commission has authority to determine that the 120-day review period begins on the date the utility files the necessary information. The Commission interpretation is permissible because it prevents an irrational result of Benwood expending its resources to prosecute its complaint before the Commission only to receive an inadequate and hasty evaluation of its rate issues. A well established cannon of statutory construction counsels against an irrational result. “It is the ‘duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results.’” Charter Communs. Vi v. Cmty. Antenna Serv., 211 W. Va. 71, 77, 561 S.E.2d 793, 799 (2002) (citations omitted).

Wheeling also seems to argue that because the Commission, in cases<sup>3</sup> governed by a different statute, W. Va. Code §24-2-11, referred to a utility request to extend a statutory review period as a request “to toll, or suspend”, that wording forever defines “toll” as placing on hold, even for cases governed by a different statute. This argument is unpersuasive because the two statutes have completely separate purposes and because W. Va. Code §24-2-11 does not contain the proviso at issue in this case. Furthermore, the Legislature has not defined “toll” in Chapter 24. The Black’s Law Dictionary definition of “toll” does not foreclose construction of W.Va. Code §24-2-1(b)(6) as applied in this case because the definition of “toll” includes annul, take away, abate, and stop.

**toll**, *vb.* (15c) 1. To annul or take away <toll a right of entry>2. (Of a time period, esp. a statutory one) to stop the running of; to abate <toll the limitations period>. See *EQUITABLE TOLLING*. 3. *Hist.* To raise or collect a tax or due for the use of something.

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<sup>3</sup> Petitioner’s brief at 21-22.

Black's Law Dictionary, 11<sup>th</sup> Ed. (2019). Nothing in the definition precludes the Commission from tolling the review period so that it began on the date the utility filed information necessary to evaluate its rate.

Wheeling seems to argue that if the Commission grants a party's request to set a decision due date earlier than that the maximum period allowed, as it did in this case<sup>4</sup>, or, if the Commission sets a goal for itself to resolve a complaint sooner than 120 days from the date necessary information is before it, but then comes to understand that it needs the full statutorily allowed review period, the Commission is prohibited from using the full period. Wheeling's position must fail because the Legislature could not have intended to delegate adjudication of a wholesale customer complaint to the Commission but force the Commission to arbitrarily decide rate issues when it has not had adequate time to analyze the issues, review the financial data, and reach a reasoned decision.

The Commission agrees with the Wheeling statement in footnote 10 on page 16 of its Petition that the Commission improperly presumed a statutory decision date of October 15, 2021 in its June 2, 2021 Order when it ordered Wheeling to provide supporting information for its rate increase within 30 days. The Commission agrees with Wheeling on this point because on June 2 it was unknown when Wheeling would actually file that information. The 120-day clock begins only when the Commission has received "necessary information showing the basis of the rates, fees, and charges or other information as the commission considers necessary." If Wheeling had filed the correct

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<sup>4</sup> Comm'n Order July 22, 2021.

information on the next day of June 3, then the statutory decision due date would have to be 120 days later, or October 1, 2021, and the June 2, 2021 Order stating an October 15 statutory date would have been incorrect.

Wheeling fails to acknowledge, however, that when Wheeling did not provide the “corrected” necessary information until July 15, the statutory decision date became November 12, 2021. In other words, until the Commission knows with certainty when the correct “necessary information showing the basis of the rates, fees, and charges or other information as the commission considers necessary” will be before it, the statutory 120-day due date is not known with certainty.

The fact is that Wheeling did not file the corrected necessary financial information until July 15, and the Commission correctly recognized that the 120-day statutory decision date was 120 days from that date, or November 12. Intervening pronouncements by the Commission that the expected statutory decision date is anything less or more than 120 days from the date that it has received “necessary information showing the basis of the rates, fees, and charges or other information as the commission considers necessary,” may be considered scheduling targets, but would not represent the statutorily required decision date pursuant to W. Va. Code §24-2-1(b)(6). Once the Commission received the correct financial justification for Wheeling’s rate increase on July 15, the statutory 120-day decision date was November 12, not sooner and not later.

**D. The substantive result of the Commission Orders was proper and is not before the Court on appeal.**

The substantive result of the Commissions Orders on the underlying complaint was proper and is not on appeal to this Court. Comm'n Orders November 12, 2021 and December 1, 2021. The Commission reviewed the complex rate issues presented in the complaint and pursuant to W. Va. Code §24-1-1(a)(4), made a reasoned determination, based on findings of fact and conclusions of law, of a just, reasonable, non-discriminatory resale rate based on the Wheeling's costs to provide service. The effect of the Commission decision is that the Wheeling wholesale customers, including Benwood, are paying a lower rate for sewage treatment service than they would under the Wheeling ordinance. The substantive result of the Commission's use of its 120-day review period was also proper because it allowed the Commission 120 days to fully evaluate the issues and reach a reasoned decision.

**E. Voiding the Commission's Orders could burden a circuit court with re-adjudication of this rate complaint.**

The Commission had primary jurisdiction over the Benwood complaint, but if the Commission Orders of November 12, 2021 and December 1, 2021 are determined to be void for lack of jurisdiction, Wheeling will reinstate its unjustified higher resale rate charged to Benwood and other resale customers. Benwood's administrative remedies, however, will be exhausted. Consistent with W. Va. Code §24-4-7 and with prior ruling of this Court, Benwood may then file its complaint in circuit court.

Although the general rule is that one must exhaust administrative remedies before going into court to enforce a right, *W. Va. Code* 24-4-7 [1923] confers concurrent jurisdiction on the Public Service Commission and

the circuit court in a limited number of cases--namely, those cases seeking a refund based on rules and practices of the Public Service Commission that are clear and unambiguous. In these limited cases, a plaintiff can proceed either before the Public Service Commission or the circuit court. However, these avenues are mutually exclusive: once a Public Service Commission complaint is filed, an appeal to the circuit court is foreclosed until the administrative remedies are exhausted.

State ex rel. Chesapeake & Potomac Tel. Co. v. Ashworth, 190 W. Va. 547, 549, 438 S.E.2d 890, 892 (1993). Re-litigation of the same rate issues that the agency having utility rate expertise has already evaluated would unnecessarily burden the resources and ratepayers of Benwood, the resources and ratepayers of Wheeling, and the time and resources of the circuit court. Furthermore, Wheeling would charge its unjustified higher resale rates during that re-litigation.

### **CONCLUSION**

The Commission has a statutory duty to ensure that disputed rates are just, reasonable, applied without unjust discrimination or preference, and based on the costs of providing the services. W. Va. Code §24-1-1(a)(4). When locally rate regulated municipal utility rates are at issue, the Commission cannot perform this duty unless it has information before it that justifies the rate ordinance. The Commission did not exceed its jurisdiction but acted within its authority pursuant to W. Va. Code §24-2-1(b)(6) when it reviewed the Benwood complaint within 120 days of the date it had before it all necessary information. This Court, therefore, should not issue a stay in this matter, but should instead affirm the Commission Orders issued November 12, 2021 and December 1, 2021.

Respectfully submitted this 28th day of January 2022.

THE PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA  
By Counsel,



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JESSICA M. LANE,  
State Bar I.D. No. 7040




CERTIFICATE OF SERVICE

I, Jessica M. Lane, Counsel for the Public Service Commission of West Virginia, do hereby certify that a copy of the foregoing "Statement of the Respondent, Public Service Commission, of its Reasons for the Entry of its Orders of November 12, 2021 and December 1, 2021 in Case No. 21-0372-S-WI" has been served upon the following parties of record by First Class United States Mail, postage prepaid this 28<sup>th</sup> day of January, 2022:

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